

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 05-11301

JEFFREY PAUL KEISLER

Debtor

SUPERIOR TITLE INSURANCE, INC.

Plaintiff

vs.

JEFFREY PAUL KEISLER

Defendant

PROC. NO. 05-1155

DECISION ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on January 13, 2006

By this adversary proceeding, the plaintiff has asked the court to declare that the defendant/debtor's obligation to it is a non-dischargeable debt as having been "obtained by – false pretenses, a false representation, or actual fraud" 11 U.S.C. § 523(a)(2)(A). The debt has its origin in a real estate transaction by which Three Rivers Construction, Inc. sold property to Cynthia Pond. The property was conveyed by a warranty deed and the plaintiff, Superior Title Insurance, issued an insurance policy insuring the buyer's clear title to the property. In connection with the transaction, the debtor/defendant, Jeffery Kessler – who was the president of the seller corporation – executed a vendor's affidavit which essentially stated that the seller had not created any liens against the property except as specifically disclosed. This statement proved not to be correct because, approximately two weeks before the closing, the defendant, acting on behalf of the corporation, had granted a mortgage on the property to Charles Hill in order to secure a \$40,000

promissory note. Hill subsequently filed suit on the note and to foreclose his mortgage on the property. That action resulted in an agreed judgment against Three Rivers Construction and, ultimately, a decree of foreclosure. Superior Title defended its insured throughout the state court action and, to avoid a sale of the property following the foreclosure decree, obtained a release of Hill's mortgage, all at a total cost of \$53,499.40. In this court, asserting that it is subrogated to the rights of its insured, Superior's complaint seeks to recover that amount from the debtor/defendant, as well as a declaration that it is a non-dischargeable debt under § 523(a)(2)(A), based upon the proposition that Keisler committed fraud by signing and delivering a false vendor's affidavit.

The matter is presently before the court in connection with plaintiff's motion for summary judgment. In addition to a determination concerning the dischargeability of the obligation described in the complaint, the motion seeks to treble the amount Superior paid for a release of Hill's mortgage by, for the first time, asserting claims for either treble damages under I.C. 34-24-3-1 and/or punitive damages under I.C. 34-51-3-4. The motion was taken under advisement after the defendant failed to respond within the time required by the court's local rules. See, N.D. Ind. L.B.R. B-7056. Soon thereafter, however, the defendant filed a response, of sorts. This response – which is titled a statement of genuine issues – clearly opposes the plaintiff's effort to increase the stakes of the litigation through the summary judgment process, by contending that the defendant has not done anything which would justify an award of either treble or punitive damages and asserts that those issues must be tried to a jury based upon a jury demand counsel filed on November 10, 2005.¹ It also

¹The court does not need to become distracted by the procedural issues created by the parties' actions concerning these two aspects of this litigation. First, since the plaintiff never amended its complaint or sought the court's permission to do so, it may not assert new claims simply by seeking that relief in a motion for summary judgment. Davis v. Sun Oil Co., 953 F. Supp. 890, 892 (D.C. Ohio 1996) cert. denied, 525 U.S. 1018. See also, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)(a complaint may not be amended by briefs filed in opposition to a motion

directs the court's attention to portions of the defendant's response to a request for admissions in which the defendant denies several propositions concerning the release of Hill's mortgage.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Bankr. P. Rule 7056(c); Fed. R. Civ. P. Rule 56(c). Initially, Rule 56 requires the moving party to inform the court of the basis of the motion and to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but simple denials or reliance on allegations in the pleadings is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). Instead, it is required to come forward and identify "specific facts" that may be in issue and then, through the use of affidavits or other admissible evidence, affirmatively demonstrate the existence of genuine issues concerning them. In ruling on the motion, the court accepts the non-moving party's evidence as true, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511(1986).

Simple denials and reliance on the pleadings is essentially all the defendant has done to oppose the plaintiff's motion. Although a liberal reading of the response may lead one to conclude that the defendant is disputing certain specific facts – the facts asserted in paragraphs 22 - 25 of a

to dismiss). Secondly, there is no right to a jury trial in dischargeability litigation such as that now before the court. Matter of Hallahan, 936 F.2d 1496, 1505 (7th Cir. 1991).

request for admissions – the defendant has failed to come forward with any admissible evidence showing that there is a genuine issue for trial on those points. The only thing the defendant has done is direct the court’s attention to the responses it gave to a request for admissions where it denied particular assertions and then went on to explain why it was doing so. Yet, that response is not in the form of an affidavit or otherwise submitted under penalties of perjury and is signed only by debtor’s counsel, not by the debtor or any other individual that would have personal knowledge of the underlying facts.

While an affirmative response to a request for admissions constitutes admissible evidence that the fact asserted is true, a party’s refusal to admit a particular fact is not evidence (admissible or otherwise) that such a fact is not true. It indicates only that the fact is being disputed and even then only for the purpose of guiding the parties in the preparation of the case by helping to clarify precisely what is in issue. From an evidentiary standpoint, such a response is no different from the a denial of an allegation contained in a pleading. Since all the defendant has come forward with in response to the plaintiff’s motion is the denial of a request for particular admissions, the defendant has failed to show that there are genuine issues concerning any of the facts upon which the plaintiff’s motion is based. If those facts are sufficient to make out a prima facie case under § 523(a)(2)(A), the motion should be granted.

Even when viewed in the light most favorable to the defendant, the evidentiary materials submitted in connection with plaintiff’s motion for summary judgment are amply sufficient to satisfy all of the elements of § 523(a)(2)(A). See, In re Mayer, 51 F.3d 670, 673 (7th Cir. 1995), In re Busick, 264 B.R. 518, 524 (Bankr. N.D. Ind. 2001). See also, Field v. Mans, 516 U.S. 59, 116 S.Ct 437 (1995). The debtor made a representation of fact concerning the status of title to the property, upon which the buyer justifiably relied in completing the transaction. See, Field v. Mans 516 U.S.

at 70, 116 S.Ct at 444. That representation proved to be false because of the lien the debtor had, acting on behalf of the corporation, granted to Hill barely two weeks before. In the absence of any evidence to the contrary, the only reasonable inferences that can be drawn from the close proximity in time between the date of the debtor's affidavit, the date of closing and the date of Hill's lien are that the debtor knew his representations were false and that he made them with the intent of deceiving the buyer into completing the transaction. U.S. v. Denlinger, 982 F.2d 233, 236-37 (7th Cir. 1992). As the subrogee of its insured, the plaintiff is entitled to recover the damages caused by the defendant's fraudulent conduct, National Mutual Ins. Co. v. Maryland Casualty Co., 187 N.E.2d 575, 577-78 (Ind. App. 1963), and those damages include not only the cost of obtaining the release of Hill's mortgage but also the fees and expenses associated with defending the title the defendant's fraud induced the buyer to accept. Worley v. Hineman, 33 N.E. 260, 264 (Ind 1893); Rieddle v. Buckner, 629 N.E.2d 860, 864 (Ind. App. 1994). Although the defendant may have acted as president of the corporation when he executed and delivered the false vendor's affidavit, that does not insulate him from liability for his own misconduct. DFS Secured Healthcare Receivables Trust v. Caregivers Great Lakes, Inc., 384 F.3d 338, 346-47 (7th Cir. 2004); Tolliver v. Mathas, 538 N.E.2d 971, 976 (Ind. App. 1989).

There is no genuine issue of material fact and, as a matter of law, plaintiff is entitled to recover the sum of \$53,499.40 from the defendant, which, pursuant to 11 U.S.C. § 523(a)(2)(A), is a non-dischargeable debt and excepted from any discharge. Judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court